IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 317

CRITES, INCORPORATED,
petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD SIMKINS AND GEORGE FLORENCE,
respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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I.

Nature of Simkins' employment by Jones.

It is argued in respondents' brief (pages 6-8) that in stating the nature of Simkins' employment by Jones we have relied entirely upon Jones' version and failed to take into account Simkins' version; that "Simkins said in substance that the agreement was to assist Jones in closing a deal with Prudential if Prudential bought the farms in at foreclosure sale"; and that the master, who heard these witnesses and observed their demeanor, accepted Simkins' version.

We find no essential conflict between the testimony of Simkins and that of Jones regarding the purpose for which Simkins was employed. Simkins testified that two or three weeks before the foreclosure sale Jones came to see him regarding the possible purchase of the 11 Madison County farms from Prudential Insurance Company (R. 146, 281); that "Jones wanted me to see if they would make any agreement prior to the sale" (R. 147); that Jones said "he would pay me if I could make a deal with Prudential Insurance Company" (R. 123); that Jones told him from the outset that he was buying the farms for someone else, whom he first described as "some Cincinnati parties," but later —before the foreclosure sale—identified by name (R. 146); that it was his understanding that Jones was to receive a "commission" (R. 153); that he, Simkins, was to be paid by Jones only "if it was to be a successful deal" (R. 281); that he received from Jones the first payment of $500 on July 3, 1933, "to guarantee me as good faith in paying me, that he was in earnest about the transaction. * * * I thought he was doing a good deal of talking about a deal of that size with no money in it, and I insisted that he pay me something as evidence of his good faith." (R. 280.)

Turning now to the report of the special master, to which counsel for the respondents refer, we quote the following:

> "* * * It appears that Mr. Jones was a real estate agent who was at the time representing the Proctor interests. In Mr. Simkins' words, Mr. Jones employed Simkins to 'represent him.' Whatever the arrangement may have been, there was a contract drawn up between Mr. Jones and Mr. Simkins wherein the latter agreed to assist the former in the matter. It is apparent also, that on June 25, 1933, at the request of Mr. Jones, Mr. Simkins attended a meeting in a local hotel, where various representatives of the Prudential Insurance Company were conferred with, regarding the possibility of purchasing the Madison County

farms. No definite arrangements were made at that time, and it was not until June 27, 1933 that Jones submitted a written offer to the Prudential and gave a certified check in the sum of $3,000 to support his offer. The evidence clearly indicates that Mr. Simkins was active in assisting Mr. Jones with his transactions in connection with arrangements to purchase the property from the Prudential. It is also clear that Mr. Simkins was active in completing the transaction by which the client of Mr. Jones became, by purchase from the Prudential after the marshal's sale, the owner of the Madison County lands containing more than 4,000 acres. There is no disputing evidence of any character as to these facts, Mr. Jones and Mr. Simkins both admit them.

"The record shows that for his services Mr. Simkins received a total of $2,797 from Mr. Jones; $500 of which was paid on July 3, 1933; $1,000 on July 8, 1933, and $1,297 on August 18, 1933. It is indicated that possibly $200 of the total amount was not paid on account of this transaction, but on account of other legal services performed by Mr. Simkins for Mr. Jones." (R. 78-79.)

The master then goes on to discuss the question whether, under the facts and the law, Simkins violated his trust, to the conclusion that petitioner's tenth exception (R. 52) should be overruled.

"* * * In so doing, the master is of the opinion that the conduct of Receiver Simkins was objectionable in that it was open to, and did cause criticism which, as an officer of this court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of this trust which would justify action by this court in the manner requested by the exceptors herein." (R. 89.)

II.

Alleged disclosure to district judge at time of confirmation of sale.

The respondent Simkins, frankly confessing his own omission to disclose to the court or to the petitioner the Jones-Prudential agreement of June 27, 1933 (brief, p. 5, ¶ [c])—let alone his own agreement to cooperate with Jones—seeks comfort from the disclosure said to have been made to Judge Hough on July 18, 1933, upon confirmation of the foreclosure sale (held July 1, 1933). Davis Harrison, attorney for Prudential, testified that "at the time of moving for confirmation I told Judge Hough of the nature of this offer, and of the price." (R. 265.) Further, that Judge Hough responded: "Harrison, this may be questioned when one or both of us may not be here, and I think as a matter of precaution it would be well to put something on file here embodying this offer." (R. 265.)

A week later Harrison prepared an affidavit, incorporating a copy of the Jones-Prudential agreement, and mailed it to the clerk of the court to be filed; at the same time, sent a letter to Judge Hough enclosing a copy of the affidavit. (R. 266-267.)

It is intriguing to consider why Harrison saw fit, at the time of confirmation of the foreclosure sale, to bring to the court's attention the agreement of June 27, 1933 between Jones and Prudential. While it is true that the attorneys for petitioner were served with notice of plaintiff's motion to confirm the sale (R. 28-29), the order confirming the sale does not indicate that any objections to plaintiff's motion were presented to the court. (R. 30-31.) Presumably, even in the absence of objections to confirmation of the sale, Harrison had some misgivings about the possible effect of the Jones-Prudential agreement on the

validity of the foreclosure sale and conceived that his statement to Judge Hough might help to protect Prudential against future attack upon the foreclosure sale based on the Jones-Prudential agreement. It seems to us, however, that the testimony of Harrison about his colloquy with Judge Hough boomerangs against Simkins. The crucial point is that Harrison told Judge Hough nothing at all about Simkins' participation in the dealings between Jones and Prudential. (R. 268.) In short, Harrison merely apprised the court that the mortgagee had resold the property at a higher price, but not that the receiver—appointed by the court to protect the interests of all parties—had had an active part, to his personal profit, in the negotiations between Jones and Prudential prior to the foreclosure sale; and that the receiver, in course of this personal employment, had acquired material information which as receiver it was his duty to divulge to the court, his co-receiver and to the petitioner, but which he chose to secrete.

The order confirming the sale merely passed upon the sufficiency of the marshal's return to the order of the sale, and recited that upon examination of said return the court finds "that the former orders of this court, as to the appraisement of said real estate and the advertisement of the sale have been complied with in every respect, and finds that the proceedings of the United States marshal have in all respects conformed to the statutes made and provided in such cases, and to the former orders of the court." (R. 30.)

Not only did Harrison fail to inform Judge Hough of Simkins' participation and profit in the transaction; but, although he saw fit to make some sort of disclosure, nevertheless stopped short and failed to state that Colonel Proctor of Cincinnati was the actual buyer of the property, a fact known to Harrison at least a week prior to the confirmation of sale. (R. 247—letter of Jones to Har-

rison, July 10, 1933.) The partial disclosure made by Harrison to Judge Hough on July 18, 1933 in no way absolves Simkins, who although present in court added nothing to Harrison's statement. (R. 286.)

III.

The growing crops.

Respondents argue that the growing crops were sold pursuant to an order of the court directing that the crops be sold to Prudential at stipulated prices, therefore no question can be raised on the sale of the crops. (Brief, 48-49.) This argument is beside the point. Prior to the foreclosure sale, Simkins had already placed himself in a position where his personal profit depended upon consummation of a sale by Prudential to Proctor (through Jones) of the 11 Madison County farms, *together with the receivers' interest in the growing crops thereon.* When Judge Hough approved the sale of the receivers' interest in the crops to Prudential, he had no inkling that one of the receivers had a personal interest in this sale. By his order to sell the crops to Prudential, he certainly did not mean to sanction Simkins' conduct, or to help him garner a personal profit. And with respect to the crops, as we have already argued, Simkins was himself a seller (in association with his co-receiver, George Florence, who had no part in the dealings with Jones and no knowledge thereof).

IV.

Petitioner's alleged laches.

The "first and final account of receivers," to which petitioner's exceptions were directed (R. 38-45, 50-63), was informally handed to Judge Hough on April 19, 1934. (R. 36.) Shortly thereafter a copy of the account was

furnished to Prudential, in order to give Prudential's auditors opportunity to check the various items, and the formal presentation of the account to the court was held in abeyance to see whether Prudential had any objections. (R. 36, 229-232.) Sharp differences arose between Prudential and the receivers on the receivers' expense charges; and further, Prudential challenged the fee demand made by Ingalls as one of the attorneys for the receivers. (R. 47-48; R. 231-232.) These differences were not reconciled prior to the death of Judge Hough (in November 1935), nor for a considerable period after Judge Underwood was inducted (in April 1936). Finally, upon the insistence of Ingalls, the receivers' account was filed February 19, 1937, and at the same time Ingalls' own application for fees. (R. 33-38; R. 38-45.) An order was entered May 13, 1937 for a hearing on the receivers' final account to be held June 2, 1937. (R. 46.)

The petitioner was not furnished with a copy of the receivers' account and knew nothing of the informal proceedings before Judge Hough. By letter of Harrison, dated May 25, 1937, counsel for the petitioner were informed that a hearing on the receivers' account was to be held June 2, 1937. (R. 107, 121.)

When the hearing on the receivers' account began before Judge Underwood (R. 106) and it quickly became apparent that the hearing would not be of routine character, but would involve the conduct of Simkins in relation to the foreclosure sale, Judge Underwood decided to refer the whole matter to a special master. At the hearing before the master, counsel for the petitioner were afforded opportunity to examine Jones and Simkins regarding the circumstances surrounding the foreclosure sale. After the examination of Jones on July 11, 1937 and the examination of Simkins on June 30, 1937, petitioner was permitted to file its exceptions to the receivers' account. (R. 50-63.)

It is vaguely suggested in respondent's brief that, prior to the 1937 hearing, petitioner already had adequate information upon which to initiate independent proceedings to set aside the confirmation of the foreclosure sale, or to charge Simkins and Prudential Insurance Company with fraud. The record shows merely that some time in 1935 counsel for the petitioner for the first time became aware that Simkins had some part in the resale of the 11 Madison County farms by Prudential to Proctor; that this discovery was made in course of other litigation, wherein Jones appeared as a witness and was examined to a limited extent regarding his dealings with Simkins. (R. 153-154.) Certainly it cannot be said from anything that appears in the record of this case that the partial discovery made by petitioner's counsel in 1935 regarding Simkins' dealings with Jones was sufficient to enable petitioner immediately to start some sort of an action in equity against Simkins and Prudential Insurance Company.

No claim of laches was asserted by the respondents in the trial court, nor in the circuit court of appeals. It is stated in the opinion of the circuit court of appeals that the petitioner "stood by for years doing nothing either to prevent or correct the situation," but this statement refers to the impropriety of permitting Harrison and Ingalls to act as attorneys for both the plaintiff and the receivers. It has no reference whatever to the complaint of the petitioner regarding the conduct of Simkins.

Respondents do not claim that there was any change in position or that any rights intervened which made it inequitable in 1937 to review the conduct of Simkins as receiver. It is suggested that Simkins was prejudiced by the delay, because of his own faulty memory and the difficulty of other witnesses in recalling what happened in 1933. Quite ironically, Simkins argues in effect that the petitioner should have prodded him to file and present his statement of account as receiver at an earlier time, forget-

ting that the delay was due entirely to the differences which arose between the receivers and Prudential Insurance Company. Even if an issue of laches could now be raised, the record clearly shows that the fault for delay rests entirely with the respondents themselves.

V.

Respondents' citations of authorities.

Except for the cases already cited in the opinion of the circuit court of appeals, the respondents cite six cases upon which we comment briefly as follows:

Twin-Lick Oil Co. v. *Marbury,* 91 U.S. 587, 23 L. ed. 328:—Loan by director to corporation, on security of a mortgage; default and foreclosure of the mortgage; purchase of the mortgaged property by defendant through agent at the foreclosure sale; bill in equity, four years after the sale, to hold defendant as trustee for the corporation.

Held: that the loan was fair and made without fraud; that the purchase of the property at the foreclosure sale was the only recourse of the defendant to obtain repayment of the money; that the defendant had no information at the time of the sale which was not as well known to the other interested parties; that the purchase made by defendant was not absolutely void, but voidable even on slight grounds of unfair dealings; that in this case, however, upon the closest scrutiny, the conduct of the defendant was unimpeachable; that even if plaintiff had the right to avoid the sale, it could not do so after waiting four years to speculate upon the rise or fall in value of the property, when all the facts on which the alleged right to avoid the purchase were known as soon as the sale was made.

Allen v. *Gillette,* 127 U.S. 589, 32 L. ed. 271:—Whether Gillette, executor of the will of James Morgan, plaintiff's grandfather, could buy for his own account plaintiff's interest in real estate devised to her by her grandfather, at mortgage trustee's sale to foreclose the mortgage executed by the plaintiff.

Held: that the property formed no part of the estate in defendant's charge and the mortgage debt was not a liability of the estate; that the defendant had nothing to do with the mortgage trustee's sale, except as bidder; that there was no element of fraud in the case; that the mere act of bidding for the property at the mortgage trustee's sale was not a violation of any fiduciary duty of the defendant as executor.

Pewabic Mining Co. v. *Mason*, 145 U.S. 339, 36 L. ed. 732:—Purchase by minority stockholders of all assets, at judicial sale in proceedings to liquidate corporation; objection to confirmation of the sale by majority stockholders.

Held: that the purchase was made without fraud or deception of any kind; that the successful bidders did not require leave of court to entitle them to bid, since they were not the vendors; that the complainants did not stand in any fiduciary relationship to the defendants which precluded them from bidding freely for themselves at the master's sale; that other objections to the time and manner of the sale were properly overruled by the circuit court.

Steinbeck v. *Bon Homme Mining Co.* (C.C.A. 8), 152 Fed. 333:—Agent bought part of company's property at tax sale, also tax certificate covering other property; made full disclosure to his principal and gave principal opportunity to redeem, which was not accepted; but after the agent had prospected and developed the property, so that it became valuable, the company claimed ownership.

Held: after the company, with full knowledge of the facts which conditioned its right to elect to avoid the tax title, rejected the agent's offer to turn over the property upon payment of the agent's cost, it could not years later take advantage of the increased value due to the expenditures, toil and energy of the agent.

DeJarnatt v. *Peake*, 123 Cal. 607, 56 Pac. 467:—Defendant sought to avoid payment of commission to plaintiff, for his services in connection with defendant's purchase of mortgage, on ground that plaintiff was receiver in proceeding to foreclose the mortgage.

Held: that the transaction was free from fraud and there was no complaint by the creditors of the deceased mortgagor; that there was no ground upon which the defendant should be permitted to escape payment of the agreed commission.

Mercantile Trust Co. v. *Sunset Road Oil Co.*, 50 Cal. App. 485, 195 Pac. 466:—In no way pertinent to any of the issues in the case at bar.

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It is not enough to say that, since Simkins did not conduct the foreclosure sale, he had no fiduciary duties in relation to the sale. The fact that the marshal conducted the sale did not relieve Simkins of his abiding obligation, while he held office as receiver, to deal impartially as between the mortgagee and the owner of the equity; not to accept secret employment, as ally of Jones, to bring about a definite arrangement under which Jones (for Proctor) could acquire the Madison County farms directly from Prudential, by-pass the foreclosure sale, and avoid any bargaining with petitioner; not to accept concurrent personal employment which brought to him the knowledge that there was available a prospective purchaser of the farms willing to pay substantially more than the decree indebtedness, but made it to his personal interest to keep this information away from the petitioner, his co-receiver and the court,—information which, if immediately and candidly divulged, undoubtedly would have changed the entire course of the foreclosure proceedings.

Respectfully submitted,

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